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Case Jacket

Case Number: 8988

Date Filed: 11/14/2003

IN THE MATTER OF THE APPROVAL OF A BATCH CUT MIGRATION PROCESS FOR VERIZON
 MARYLAND INC. PURSUANT TO THE FEDERAL COMMUNICATION COMMISSION'S TRIENNIAL
 REVIEW ORDER

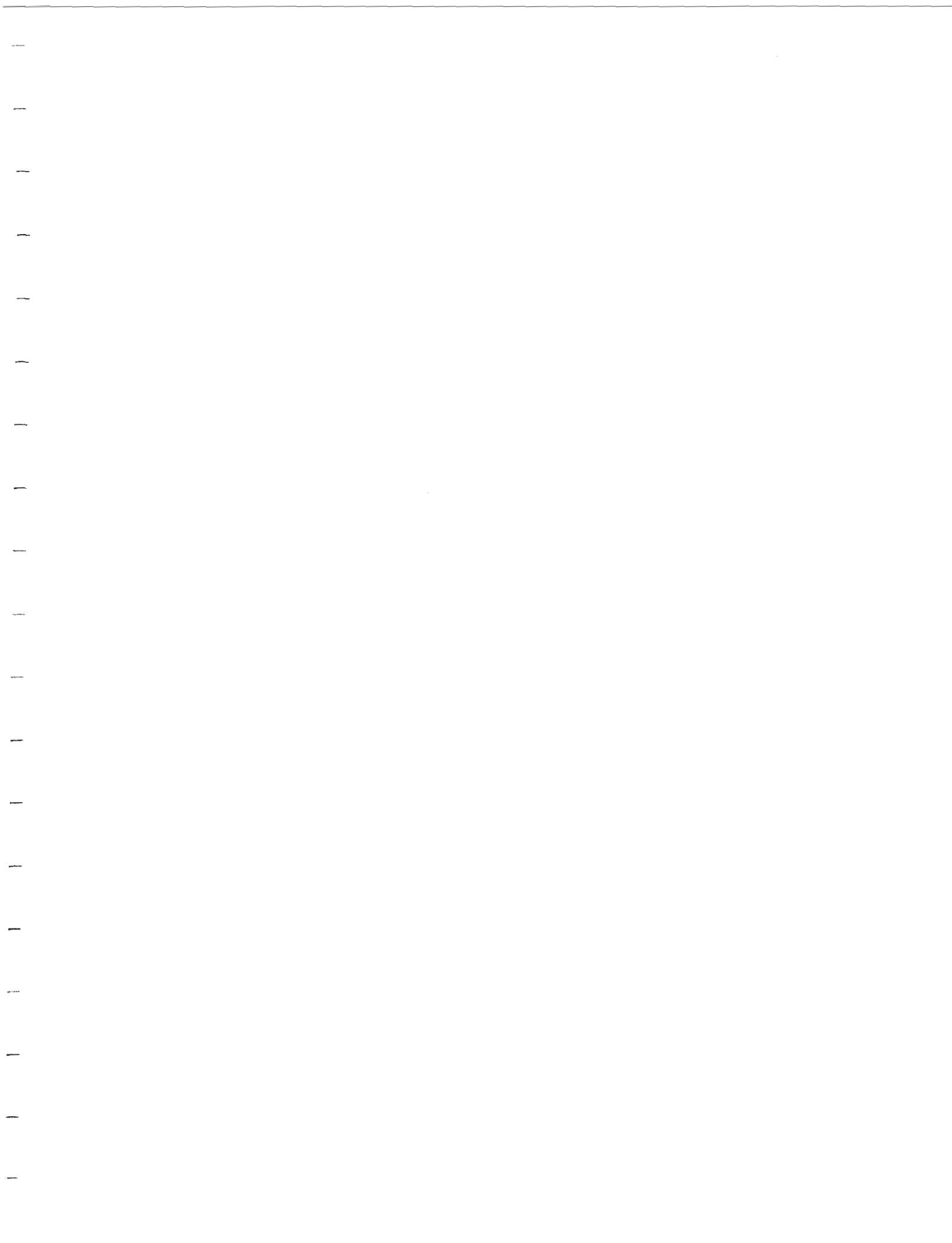
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22	Verizon Maryland Inc. - a letter requesting that the Commission Stay pending the outcome of vacatur of the FCC Triennial Review Order by the United States Court of Appeals for the District of Columbia Circuit. Case No. 8988.	03/08/2004
23	Office of Staff Counsel - request for an emergency extension of the filing date for Rebuttal Testimony. Case No. 8988.	03/09/2004
24	Hearing Examiner Division - Service List. Case No. 8988.	03/11/2004
25	Hearing Examiner Division - a letter to parties indicating that the testimony due on March 10, 2004 is hereby postponed until March 17, 2004. Case No. 8988.	03/11/2004
26	The Commission - a letter to parties indicating that the Commission determined that the proceeding be stayed as a result of the United States Court of Appeals for the District of Columbia Circuit's recent vacatur/remand of portions of the FCC's Triennial Review Order. Case	03/16/2004

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

IN THE MATTER OF)	
<i>Unbundled Access to Network Elements</i>)	WC Docket No. 04-133
<i>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</i>)	CC Docket No. 01-338

**Summary of the Impairment Analysis Performed by the Staff of the Public
Service Commission of Maryland in Case Nos. 8983 and 8988**

October 4, 2004

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 Pre-filed Public Testimony of Douglas Dawson (Case No. 8983)
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I. INTRODUCTION AND SUMMARY

The Staff (Staff) of the Maryland Public Service Commission (PSC or Commission) hereby provides a summary of positions established in the Triennial Review proceedings held before the Commission. These positions are more fully articulated and supported in the attached Staff testimony which was filed in the proceedings established in Maryland pursuant to the Federal Communications Commission's (FCC) Triennial Review Order (TRO).

In its Order and Notice of Proposed Rulemaking issued on August 20, 2004, the FCC encouraged state commissions and other parties to file summaries of state proceedings to highlight factual information that would be helpful to the FCC in making impairment findings under the guidance of USTA II and provide information regarding state commission efforts to develop a batch hot cut process.¹ Shortly after the issuance of the Interim Rules Order, the Commission contacted other parties to the cases initiated in Maryland to consider impairment analyses and the development of a batch hot cut process and found that those parties intended to file their own summaries with the FCC.

For that reason and the abbreviated time period between the issuance of the Interim Rules Order and the comment due date specified therein, the Commission determined that it would not make an attempt to coordinate the filings of all of the parties in the state proceedings. Instead, the Commission directed its Staff to submit its testimony and a summary in response to the Interim Rules Order. As indicated elsewhere, the Commission stayed the state proceedings before rendering a final decision on the impairment issues and before Staff filed its rebuttal testimony regarding the hot cut process. Consequently, this filing summarizes Staff's evaluation

¹ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, para. 15. (Interim Rules Order).

and conclusions in the state proceedings to which it was a party, and does not represent the Commission's position on any issue.

Based on Staff's examination of the record evidence, it concluded in written testimony filed with the Commission and attached to this summary that:

- For purposes of impairment analysis, there are three relevant local telecommunications markets in Maryland. The market defined as the Washington DC MSA market is comprised of 35 wire centers, while the market defined as the Baltimore MSA market consists of 40 wire center. The 131 wire centers in the rest of the state comprise the third relevant market.
- CLECs would be impaired in serving mass market customers in all three mass markets in the state in the absence of the mass market switching UNE.
- CLECs would be impaired throughout the state in the absence of mass market loops.
- CLECs were not impaired anywhere in the state with respect to enterprise switching.
- CLECs would be impaired throughout the state in the absence of enterprise market loops.
- CLECs would be impaired in the provision of service to both mass market and enterprise market customers in all three markets in the absence of dedicated transport and dark fiber UNEs.
- The demarcation between the mass market and the enterprise market was economically determined to be seven DS0 lines.
- Staff determined that the rates for initial and subsequent hot cuts within a batch should be \$27.05 and \$15.07 respectively.
- The number of hot cuts processed within a batch should be 34 on the average, but should vary directly with the size of the wire center.
- The Carrier-to-Carrier Guidelines and Performance Assurance Plan should be expanded to include any batch hot cut process that is adopted.

II. STATUS OF STATE RECORD AND PROCEDURAL HISTORY

The Maryland Public Service Commission docketed two Cases to respond to issues raised by the FCC's Triennial Review Order ("TRO").² Activity in both cases was suspended prior to final Commission decisions as a result of the March 2, 2004 Order of the United States Court of Appeals for District of Columbia Circuit and subsequent stays by the PSC.³

No CLECs filed testimony to dispute the FCC's presumption of impairment for enterprise switching, and therefore the Maryland Commission did not conduct a 90-day case. Regarding the nine-month proceeding, no party contested the FCC finding that impairment exists for mass market loops, but Verizon-Maryland did submit testimony asserting the absence of impairment for mass market switching, specific dedicated trunk routes and specific enterprise loop addresses in the Washington and Baltimore markets.⁴

In Case No. 8983, the Commission directed Staff to submit testimony to define the markets and to perform an impairment analysis consistent with the triggers methodology and other guidelines provided by the FCC. The Commission issued a Census Data Request in December of 2003 requiring all CLECs operating in the State to declare how many customers they served and the type and location of facilities they owned to serve those customers. Staff collected additional data to determine how many Maryland consumers were served by CLECs that did not own and operate facilities but instead utilized resale of the ILEC's retail service or

² See Case 8983 *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Order*, and Case 8988 *In the Matter of the Approval of a Batch Cut Migration Process for Verizon Maryland Inc. Pursuant to the Federal Communication Commission's Triennial Review Order*. All public filings in the cases may be accessed using the case search function of the Maryland PSC website, at www.psc.state.md.us.

³ Commission Letter Order dated March 15, 2004 to stay Case 8983 and Commission Letter Order dated March 16, 2004 to stay Case 8988.

⁴ Testimony of John R. Gilbert and Carlo Michael Peduto, II dated October 31, 2003, submitted in Case 8983.

provided service to end users over UNE-P arrangements leased from Verizon-Maryland. Staff analyzed all of the data filed with the PSC and utilized that data to:

- examine the state of competition in Maryland,
- define the relevant markets in Maryland,
- perform an impairment analysis for mass market switching,
- perform an impairment analysis for dedicated transport, and
- establish a demarcation between the mass market and the enterprise market.

While Staff possessed the data required to perform the enterprise loop impairment analysis, its review had not been completed when the March 2, 2004 Order was issued by the Circuit Court and the Commission stayed the proceeding on March 15, 2004.⁵ At that time, direct and rebuttal testimony had also been filed by the other parties to the case and public evidentiary hearings were scheduled, but never held.

Following the issuance of the FCC's TRO, the Commission also docketed Case 8988 to develop a batch hot-cut process. Staff requested that each of the carriers that were parties in the case to supply it with descriptions of methodologies identifying the economic and operational aspects of batch hot-cut processes which the parties believed would have to be addressed in order for a viable batch hot cut process to be acceptable. The parties met twice to discuss their proposals and to determine whether a consensus could be reached on the issue, however, the parties were not able to do so. Based on that parties filed testimony, and Staff performed its analysis to determine:

- an acceptable batch hot cut interval;
- an appropriate volume of lines in a batch; and
- a TELRIC cost basis for a batch hot-cut.

⁵ Commission Letter Order dated March 15, 2004 to stay Case 8983. See <http://webapp.psc.state.md.us/Intranet/CaseNum/CaseAction.cfm?RequestTimeout=500>.

Initial testimony was filed by Staff and other parties, and public evidentiary hearings were scheduled, but never held. Staff prepared its rebuttal testimony which was scheduled to be filed the day after the Commission stayed the batch hot cut proceeding.

III. SUMMARY OF PARTIES AND STAFF TESTIMONY

The following section includes a very condensed summary of the parties as well as a more detailed summary of Staff's testimony that was submitted in the impairment and hot-cut cases, as well as post TRO findings that were not filed on the record.

A. Summary of Verizon-Maryland's Position on Market Definition and Impairment

Verizon asserted that the relevant markets should be defined as the Washington and Baltimore metropolitan statistical areas (MSAs). Verizon also asserted that there is no impairment for mass market switching in either market. In addition, Verizon provided a list of specific dedicated trunk routes as well as a specific list of enterprise loop addresses, which it claimed were not impaired.⁶

B. Summary of the CLECs' Position on Impairment

Other parties to the case included Allegiance Telecom of Maryland; AT&T Communications of Maryland, Inc.; Cavalier Telephone Mid-Atlantic, LLC; Covad Communications Company ("Covad"); MCI Worldcom Communications, Inc.; Office of Peoples Counsel; U.S. Department of Defense and All Other Federal Executive Agencies; XO Maryland, Inc.; and Xspedius Management Company. Those parties' positions on impairment were very similar. All of those parties presented evidence demonstrating that impairment exists in all areas of Maryland. Based on those observations, several CLECs indicated they might need to rethink

⁶ Testimony of John R. Gilbert and Carlo Michael Peduto, II dated October 31, 2003.

continued operations in the mass market in Maryland in the absence of the continued availability of UNE-P arrangements.

C. Summary of Maryland PSC Staff Testimony

i. Geographic Definition of Market

In its TRO, the FCC required the states to undertake an impairment analysis to define the geographic markets and perform impairment analysis for unbundled loops, enterprise market switching (90 day case), mass market switching, dedicated transport and enterprise loops.⁷ No party filed testimony rebutting the FCC's nationwide presumption of no impairment with respect to enterprise market switching and therefore no 90-day case was required. Verizon filed testimony to establish its definition of the competitive markets in Maryland and to establish its position that no impairment existed in the Baltimore MSA and Washington MSA.

Jerry Hughes, Assistant Director of the Telecommunications Division of the Maryland Public Service Commission, provided testimony on the state of competition and the definition of the relevant geographic areas that comprised the telecommunications markets in Maryland.

Staff used a two-prong approach to collect and organize data submitted by the parties. First, the Commission issued a Census Data Request to all carriers requiring them to declare the size and scope and other characteristics of their operations in Maryland. Responses to this Census Data Request were submitted as confidential data that could be viewed only by those parties that had signed non-disclosure agreements. All responses to the Census Data Request were compiled by Staff and made available to authorized parties on the PSC web site. Second, Staff prepared its own series of data requests which were designed to enable it to provide substance and perspective to the evaluation of the raw data, and to clearly determine whether a

⁷ Testimony of Jerry Hughes, Kevin Mosier, Faina Kashtelyan and Doug Dawson dated March 12, 2004.

particular carrier was delivering its services via a mass market architecture⁸ or an enterprise architecture⁹.

Staff used an iterative approach to its evaluation of the data. The final conclusions Staff reached were the result of reaching interim conclusions and then re-evaluating and adjusting those conclusions as additional data was received and evaluated.

ii. Assessment of Competition

Staff used the data in many ways, the first of which was to perform an evaluation of the state of competition in Maryland. The aggregate of all facilities based and non-facilities based CLEC lines yielded 565,063 lines that represent a 13.4% penetration. The distribution of those lines to market segments is shown in table A.

Table A
CLEC Distribution by Service Architecture

Facilities Based Providers			Non-Facilities Based Providers	
CABLE ARCHITECTURE	MASS MARKET ARCHITECTURE	ENTERPRISE ARCHITECTURE	UNE-P	RESALE
2 PROVIDERS	7 PROVIDERS	8 PROVIDERS	11 PROVIDERS	13 PROVIDERS
12,954 LINES	17,288 LINES	282,629 LINES	220,022 LINES	32,170 LINES
2.3% SHARE	3% SHARE	50% SHARE	39% SHARE	5.7% SHARE

Staff's analysis also indicated that ten of the 27 providers that responded to data requests, serve fewer than 1,000 lines each. Staff's analysis showed that the majority of all lines served by CLECs are business lines and that those lines are served using an enterprise architecture.

⁸ For purposes of this presentation, a mass market architecture refers to customers lines served by a standard two wire DS-0 loop.

⁹ For purposes on this presentation, an enterprise architecture refers to customer lines that are served by DS-1 or higher facilities.

Staff also observed that the preponderance of CLEC provisioned mass market end user service was accomplished over UNE-P arrangements. Taken together, the enterprise market lines and UNE-P based lines represent 89% of all CLEC lines in Maryland. Very few lines are served by facilities based providers using a mass market architecture. Staff concluded that while there was a significant increase in the number of lines served by CLEC's from the previous year, it was not clear that a significant amount of that increase was attributable to carriers using their own facilities. In fact, the majority of the additional lines were apparently over UNE-P arrangements.

Staff's competition analysis also revealed that 73% of the UNE-P and resale lines were in service in the Baltimore and Washington markets while only 27% of the UNE-P lines in the state were used to provide service outside the Baltimore and Washington DC MSAs. Finally, Staff concluded that while competition existed in Maryland, it had not yet reached critical mass. In its testimony, Staff identified various reasons why competition was not widespread throughout the state. Specifically, Staff noted that:

- Less than 1% of mass market customers were served by facilities based competitive providers, the majority of which were cable companies.
- More than 90% of the facilities based lines serve the business sector via an enterprise architecture.
- The vast majority of mass market CLEC customers (>85%) are served by UNE-P or resale.

iii. Market Definition

Staff used a range of criteria to define the markets. Staff examined the data it received from service providers in ways that would allow Staff to establish the distribution of CLEC-provided lines by geography, customer size and network architecture used. Staff used a

combination of competitive line density, presence of multiple CLECs and geographic community of interest criteria to evaluate and characterize the telecommunications markets in Maryland.

Staff also considered the FCC requirements that the impairment analysis be performed in a granular manner.¹⁰ In particular, Staff's market definition analysis was guided by the FCC's statement that "states should not define the markets so narrowly that a competitor serving that market alone would not be able to take advantage of the available scope and scale economies from serving a wider market."¹¹ These two rules established that even though a CLEC should be entitled to enjoy a scope and scale of economy similar to that enjoyed by an ILEC, the impairment evaluations would have to be done at a granular level based on data submitted by the parties.

To address this matter, Staff evaluated the data to identify the individual wire centers within which the majority of the CLECs were collocated. The analysis yielded information about the proportion of wire centers in the Washington and Baltimore MSAs and in the non-MSA territories of the state, the proportion of CLEC collocations in each region, and the proportion of UNE-P and resale lines served in each geographic region.

In spite of the evidence that CLECs have achieved a 13% overall penetration in Maryland, competition in the mass market has reached only about 6.3% on a statewide basis, and the majority of those mass market access lines (89%) was served over UNE-P arrangements.

¹⁰ TRO paragraph 495 which states "...state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors,¹⁵³⁷ the variation in factors affecting competitors' ability to serve each group of customers,¹⁵³⁸ and competitors' ability to target¹⁵³⁹ and serve specific markets economically and efficiently."

¹¹ TRO Paragraph 495 which states "...states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."

Staff observed that CLECs were quite cautious and deliberate in selecting wire centers in the Washington and Baltimore territories from which to serve mass market customers. There is an observable correlation between the total number of access lines in each territory and the number of access lines served by CLECs in those territories, especially in the case of UNE-P. Table B shows how the CLEC collocation sites, resale and UNE-P lines align with various geographic regions within the state.

Staff concluded that it was appropriate to define the relevant markets as the Washington MSA, the Baltimore MSA and the rest of the state. However, in order to allow for a granular impairment analysis, each of the relevant markets was defined as the aggregation of individual wire centers with similar characteristics. Staff compiled a specific list of the 35 Washington area wire centers and the 40 Baltimore-area wire centers which, when combined, define the geography of the two MSA-based markets in Maryland. The remaining 131 other wire centers in the non-MSA territory defines the third geographic market in Maryland. This "bottoms-up" methodology not only defined the relevant markets in a granular manner, but also enabled a trigger analysis to be performed at a granular level. The Maryland Markets Map shown below displays the boundaries of the three relevant markets defined by Staff. It should be noted that the Geographic markets defined by Staff are similar but not identical to the MSA markets proposed by Verizon. The primary difference is that Staff's geographic markets removed a small number of wire centers from Verizon's MSA market definition because they were more similar to the demographics of the non-MSA market.

As indicated in Table B, Staff's market definition produced markets consisting of approximately an equal percentage of the State's access lines. The data in Table B also shows that CLEC mass market participation in the State's three geographic markets is overwhelmingly

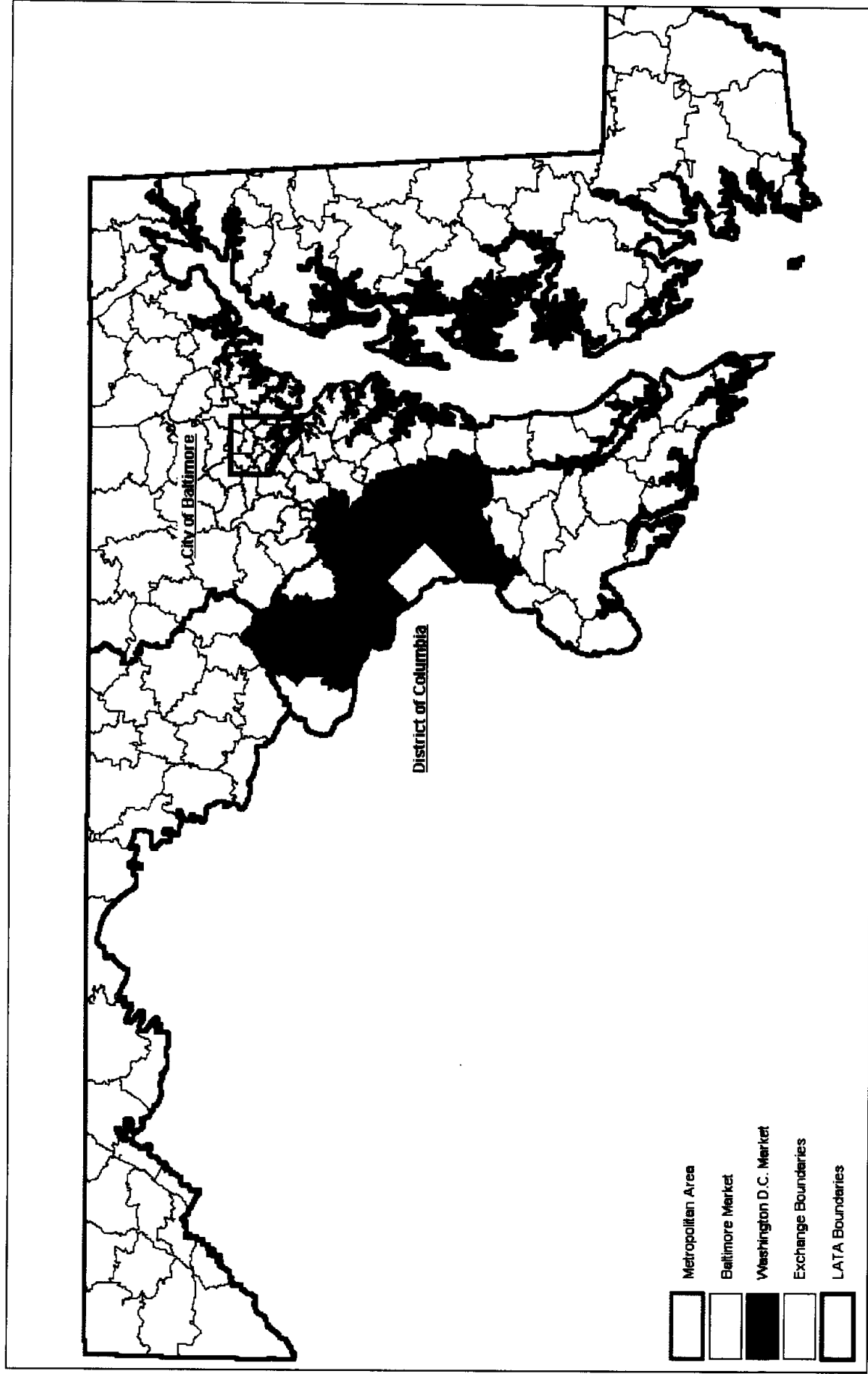
in the form of access lines served using UNE-P, and that UNE-P based lines are located predominately in the Washington MSA and Baltimore MSA markets. It also shows that CLEC provisioning of mass market service in the non-MSA defined market is primarily through resale.

TABLE B

MARYLAND MASS MARKET LINE DISTRIBUTION BY RELEVANT MARKET

DESCRIPTION	Washington MSA	Baltimore MSA	Non-MSA Territory	Total	Total Line Penetration
Number of Wire Centers in Territory	35	40	131	206	
Distribution of Wire Centers – Percent of State	17.0%	19.4%	63.6%		100%
Number of Wire Centers With CLEC Collocation	33	37	40	110	
Distribution of CLEC-Collocated Wire Centers	30.0%	33.6%	36.4%		100%
Total CLEC Collocations Per Market	74	87	43	204	
Distribution of CLEC Collocations	36.3%	42.6%	21.1%		100%
Number of CLEC UNE-P Lines per Market	77,815	82,696	58,883	219,394	5.6%
Distribution of CLEC UNE-P Lines Across Markets	35.5%	37.7%	26.8%		100%
Number of CLEC Resale Lines per Market	6,316	8,415	11,150	25,881	0.7%
Distribution of CLEC Resale Lines Across Markets	24.4%	32.5%	43.1%		100%
ILEC Mass Market Lines per Market	1,247,658	1,201,225	1,192,196	3,641,079	93.7%
Distribution of ILEC Lines Across Markets	34.3%	33.0%	32.7%		100%
Total Mass Market Lines per Market	1,331,789	1,292,336	1,262,229	3,886,354	
Distribution of Mass Market Lines Across Markets	34.3%	33.3%	32.7%		100%

Maryland Markets Map



iv. Mass Market Switching Impairment Analysis

Kevin Mosier, an Economist in the Telecommunications Division of the Maryland Public Service Commission, performed the mass market switching impairment analysis. All aspects of Staff's mass market switching impairment analysis relied upon the data collected from the Commission Census Data Request and additional Staff data requests. A great deal of effort was invested to ensure that data used by Staff to evaluate the mass market switching triggers did not include line counts associated with the enterprise switching market. Staff is confident that it was able to effectively separate the mass market data from the enterprise market data.

The purpose of the Commission Census Data Request and the Staff data requests was to determine how many CLEC lines were in service in Maryland, as well as to enable Staff to determine how many lines were being served by both facilities based providers as well as non-facilities based providers.

First Staff identified the carriers that were focused exclusively on the enterprise market. Factors that Staff used to identify these companies included company statements that they did not serve the mass market and/or evidence that the company deployed its services exclusively via enterprise architecture. To the extent that Staff identified companies which served the enterprise market exclusively, those companies were eliminated from the mass market switching impairment evaluation.

In addition to enterprise-only service providers, cable television companies were eliminated from the impairment analysis because they do not rely upon the embedded ILEC switching facilities to reach their customers. Since the cable companies support their mass market switching customers on wholly owned and operated switching systems, the cable

telephony providers will not be dependent upon any hot cut process that is ultimately developed and implemented.

Staff then considered whether each remaining company had demonstrated evidence that it had or would soon achieve a critical mass of customers that would enable it to remain a viable competitor in Maryland. Those companies which reported as few as four mass market lines and as many as 168 mass market lines were determined to be serving a diminimus number of customers, and were eliminated from the mass market switching impairment evaluation.

After taking those factors into consideration, only one company remained as a potential user of any batch hot cut process. Even though that carrier operated in both the Washington MSA market and the Baltimore MSA market, it alone could not satisfy the FCC requirement that three or more facility based/self provider companies serve customers in a market.¹² Therefore since only one company appears to have met the self-provisioning trigger in Maryland, Staff's testimony recommended to the Commission that CLECs would be impaired in the absence of the mass market switching UNE.

v. Dedicated Transport Impairment Analysis

Faina Kashtelyan, an Economist in the Telecommunications Division of the Maryland Public Service Commission, conducted Staff's transport impairment analysis. Staff based its transport impairment analysis on the data submitted by CLECs in response to the Commissions Census Data Request and additional Staff's data requests.

From the data presented, Staff concluded that only a few CLECs satisfy the FCC definition of providing dedicated transport.¹³ A number of companies were excluded from the

¹² TRO paragraphs 462 and 501.

¹³ TRO paragraph 366 defines the dedicated transport network element to include "...only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches."